SUPREME COURT, U. S.

FILED

FEB 8 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 1029

JOHN J. DELURY, Individually and as President, JOHN J. CONROY, Individually and as Treasurer, etc. of UNIFORMED SANITATIONMEN'S ASSOCIATION, LOCAL 831, INTERNATIONAL BROTHERHOOD OF TEAMSTERS AND CHAUFFEURS, etc.,

Appellants,

vs.

THE CITY OF NEW YORK,

Appellee.

JURISDICTIONAL STATEMENT

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No.

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Appellants,

VS.

THE CITY OF NEW YORK,

Appellee.

JURISDICTIONAL STATEMENT

Appellants appeal from a final judgment of the New York State Court of Appeals made November 21, 1968 and entered in the Office of the Clerk of the New York Supreme Court, New York County on December 11, 1968 and submits this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial Federal questions under the Constitution of the United States are presented.

Opinions Below

The opinion of the New York State Court of Appeals is reported in 23 N.Y. 2d 175 (Appendix A). The opinions of that Court in *Rankin* v. *Shanker* (3 of the 7 Judges dissenting) upon the basis of which, as stated by such Court,

one of the constitutional questions herein presented was decided, is reported in 23 N.Y. 2d 111 (Appendix B). The remittitur (Appendix C, p. 6a) and the decision of the New York Court of Appeals declining to amend its remittitur, upon the ground that the Opinion of such Court "clearly indicates that the constitutional arguments raised by appellants were passed upon" (Appendix C-1, p. 9a), are annexed.

The opinions of the New York Supreme Court, Special Term, Part I (the trial court) are unreported (Appendix D, pp. 10a-16a).

Jurisdiction

This proceeding to punish appellants for criminal contempt of court was instituted pursuant to the provisions of N.Y. Laws 1967, Chapter 392 (Civ. Serv. Law Art. 14), commonly known as the Taylor Law.

The judgment of the New York State Court of Appeals was made November 21, 1968 and entered on December 11, 1968, as above noted.

Notice of Appeal to this Court was served and filed in the Office of the Clerk of the New York Supreme Court, New York County on December 30, 1968.

The jurisdiction of the United States Supreme Court to review the judgment by direct appeal is provided for by Title 28, § 1257 (2) of the United States Code.

The following typical decisions of this Court sustain its jurisdiction to review this decision by direct appeal: *Duncan* v. *Louisiana,* 391 U.S. 145. Note also *Keyishian* v. *Board of Regents,* 385 U.S. 589; *Bloom* v. *Illinois,* 391 U.S. 194.

New York Law Involved

New York Constitution, Article I, § 2 (Appendix E, p. 17a).

New York Civil Service Law, Article 14 (Appendix E, pp. 17a-22a).

New York Judiciary Law (Appendix E, pp. 22a-26a).

New York Labor Law (Appendix E, pp. 27a-29a).

Questions Presented

The questions presented by this appeal are:

1. Is it an unconstitutional denial of equal protection of the laws and due process for a State, which by statute accords to defendants generally the right of trial by jury in civil and criminal prosecutions for contempt arising out of the violation of a labor dispute injunction, to at the same time deny such right to trial by jury in a criminal prosecution for contempt arising out of the violation of a labor dispute injunction merely because the labor dispute involves public employees, particularly where the duties of such employees are identical to these commonly carried out by persons in private employment?

2. Where a State statute provides that no union or officer of a union shall be held responsible for the acts of its members in the course of a labor dispute except upon proof "without the aid of any presumptions of law or fact" of the doing of such acts and of its or his "actual participation in or actual authorization of such acts", is it a denial of due process and the equal protection of the law to refuse to accord the benefits of such statute to a union and a union officer merely because the union members engaged in such labor dispute are public employees and may the union and its officer be validly convicted of criminal contempt of a labor dispute injunction in the absence of such direct evidence or of any substantial evidence of such conduct by it or him?

3. Whether Article 14 of the New York Civil Service Law unconstitutionally deprived the appellants of liberty

and property without due process of law, by prohibiting them from striking, and by commanding them to continue to work for the Government of the City of New York against their will, without making any provision for payment of just compensation for such continued involuntary labor?

4. Whether the said statute unconstitutionally denied to the appellants the equal protection of the laws, by excluding them from the application of the State's labor relations laws, and making no equivalent provision for payment of just compensation for the involuntary labor which it commands governmental workers to continue to perform for the Government, against their will?

5. Whether the injunction herein went beyond the prohibition of a strike by governmental workers, by prohibiting informational picketing and meetings by such workers?

Statement of the Case

These are the circumstances, as set forth in the printed Record on Appeal * to the New York Court of Appeals, out of which this appeal arises:

The members of appellant Union are employees of the Department of Sanitation of the City of New York. Their duties are the cleaning of streets and the removal of rubbish.

For some years the City and the Union have engaged in collective bargaining in regard to the wages and working conditions of such employees.

A collective bargaining agreement between the City and the Union expired on June 30, 1967 (31). Negotiations in

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* All references are to pages of that printed Record, except as herein noted.

regard to a new agreement, which had been commenced in April, 1967, continued sporadically through the year (167-169, 175, 177, 183).

On the evening of January 31, 1968, the City and the Union's officers reached a tentative accord in regard to a collective bargaining agreement (183-4, 205-6). The Union officers recommended its acceptance to a meeting of Union shop stewards (184-5, 205-6). Although the Union constitution provided that only the members may reject a proposed collective bargaining agreement and only then by a two-thirds vote on a secret ballot and that a strike cannot take place except upon a similar vote similarly conducted (42) the shop stewards' reaction to the proposed agreement was "explosive" (184). They shouted down the efforts of appellant DeLury to bring order to their meeting, ignored his statements calling to their attention the above-cited provisions of the Union's constitution (184-5), and "from that point on" they "[took] it on themselves", to reject the proposal and to demonstrate (185). Thereupon, and without waiting for action on the proposal by the membership as provided in the Union constitution, the City rejected the proposed agreement (184). From then on, it is clear that the Union and its officers had lost control of the situation.

On the morning of February 2nd a large number of employees of the Sanitation Department failed to appear for work (87-89) and demonstrated in front of City Hall (85-6). "At no time" did the Union or any of its officers suggest "strike action or slowdown" (95). A wild-cat work-stoppage was on, commencing in the early hours of February 2nd, and the City, ten hours later, obtained a temporary injunction against the wild-cat work-stoppage which was already in full effect (85, 87-8, 131-2).

Defendant DeLury and the other Union officers nevertheless kept up active negotiations with the mediators (186-187). As indeed they did continually from that point until

and even after Mr. DeLury was put in jail (189-190). Union representatives took over the task of attending negotiations and bargaining on a round-the-clock basis in an attempt to reach a settlement which would induce the men to return to work (190-200). Finally, the Governor took an active role in the negotiations and he and the Mayor jointly appointed a Board of Mediators (198).

A recommendation made by the Board of Mediators on February 9 was immediately accepted by the Union representatives (198), and thereafter was accepted at a special meeting of the membership of the Union (198-199).

The Mayor rejected the recommendations out of hand (198).

On February 10, 1968, in response to an appeal and an arrangement made by the Governor, the Sanitationmen returned to work (199-200).

The Labor Injunction

On the afternoon of February 2, 1968—some ten hours after the wild-cat work stoppage occurred—the City made application to the Justice presiding at Special Term, Part II of the Supreme Court, New York County, for an Order to Show Cause bringing on a motion for an injunction *pendente lite* restraining the Union, its named officers and fictitiously-named employees of the City of New York from engaging in a strike and strike action and directing them "to forthwith instruct all members" of the Union "not to engage or participate" in such strike. The City further requested that in such Order to Show Cause defendant be stayed from engaging in a strike or strike activity and the named defendant officers of the Union be "directed to instruct all members" of the Union "not to engage in any strike" (25-29). Such order was signed at 3:30 P.M. and served at 5 P.M. on the Union's attorneys (72, 85, 115, 141).

The motion for temporary injunction came on to be heard on February 5, 1968. Even though there was then outstanding an order restraining the defendants pending the hearing of that motion, the Court refused to grant even a one-day adjournment of that motion.

When an attempt was made to approach a discussion of the constitutionality of the Taylor Law the Court gave the subject short shrift, saying (76-77):

> "I will dispose of that constitutional question for you in one minute. The language is the same as it was in the Condon-Wadlin Act and that was held constitutional all the way up the line. So don't talk about the constitutionality.

Before the motion for temporary injunction was even argued, an Order to Show Cause bringing on a trial to punish defendants for criminal contempt of the preliminary restraining order was issued on the afternoon of February 5 and made returnable at 9:30 a.m. the following morning (80-83). Defendants promptly objected to "this unseemly haste" (80) and their counsel protested (81):

> "It is impossible for me to deal with a situation of this kind in such a short period of time."

The response of the Court was (82):

> "I will see you tomorrow morning."

The Criminal Contempt Trial

The trial of appellants for criminal contempt commenced on February 6, 1968 at 9:30 a.m. (83-4).

It was conducted before a Justice, without a jury.

The sole evidence offered against the Union officers was the following:

1. A statement purportedly made by the defendant DeLury *after* the walk-out had taken place (72, 85), and

before the first Order to Show Cause was signed (85), to an assemblage of persons in front of City Hall (Pl. Ex. 1, R. 228). That paper, entitled "Channel 2 News", apparently composed by an unidentified source, purports to set forth a statement of appellant DeLury made on the morning of February 2, 1968 outside City Hall:

> "Your sentiments before was go-go-go. I'd accept a motion for go-go-go (cheers). All in favor signify by saying yes (cheers). All opposed (boos). I didn't come here to bargain, I took a firm position with the City, I gave the members a final offer of this union. Now I want to show discipline here this morning—or this afternoon—I don't want to show where there is confusion in the members—you got a job at the locations to see that this is effective 100% (cheers)."

2. Testimony that almost all sanitationmen failed to appear for work on February 2nd, 3rd, 5th and 6th (87-88).

3. Testimony by a consultant to the Union in regard to labor negotiations between the City and the Union (90-92) and testimony by the same person that he had "no knowledge" (94) of whether defendant DeLury "gave instructions to the sanitationmen—with respect to engaging in a strike—after Mr. Justice Spiegel's order was served at 5:00 P.M. on February 2", and that "[a]t no time" (95) did Mr. DeLury or any other Union officer tell the City that there would be a strike" "unless a contract was entered into" (95).

4. Testimony of the Commissioner of Health and the Fire Commissioner to the effect that the accumulation of garbage constituted a health and fire hazard (101-104, 107-110).

5. Testimony of a police officer identifying records, assertedly kept in the course of business (Pl. Ex. 2), entitled "Sanitation Department Locations Being Picketed" (105), neither identifying the "pickets", nor show-

ing who they were, nor on whose behalf they were picketing, nor what they were picketing about nor how many there were.

6. A proposal by the City that it would (110)

> "Offer . . . testimony of *particular* sanitation men* as to whether or not *they* had received instructions from Mr. DeLury to report back to work."

and the statement by the attorney for Mr. DeLury,

> "that if *these* witnesses were called, they would testify that *they* did not receive any instructions from Mr DeLury to go back, because Mr. DeLury did not send them out, and Mr. DeLury did nothing to bring them back." (110)

On the basis of this sparse, inconclusive, and largely incompetent testimony the Court dismissed the application to regard to all of the named Union officers (14, 112), with the sole exception of appellant DeLury and, notwithstanding that the evidence in regard to Mr. DeLury was identical to that offered in regard to the other officers, the Court found him guilty of criminal contempt, sentenced him to 15 days in jail and fined him $250.

The City was ready with a pre-prepared Order and Mandate adjudging defendant DeLury guilty of criminal contempt (117). That proposed order as so submitted by the City contained a provision finding that the Union "by a vote of its members" resolved not to report for work "until a collective bargaining agreement had been ratified" (117-118). The evidence upon this score was so manifestly contrary to any such fact, that these words were stricken by the Court (118) and there was substituted therefor the provision "on February 2, 1968, there was a strike by said organization against the Department of Sanitation of the City of New York".

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* Ten in number (see 23 N.Y. 2d at p. 181, note 4, App. A).

The following day the trial was continued against the Union—again before a Justice and without a jury—to punish it for criminal contempt of Court for its asserted failure to obey the temporary restraining order contained in the order to show cause dated February 2, 1968 and the preliminary injunction dated February 5, 1968 (121).

Testimony was adduced to the effect that sanitation employees had not appeared for work on February 2 and 6 (131). Further testimony was adduced (134-135) as to the amount of Union membership dues checked off from Department of Sanitation employees' salaries by the City.

The only other evidence offered by the City was a tabulation (Pl. Exh. 3) dated February 7, 1968 entitled "Sanitation Department Locations Being Picketed." As in the case of the prior such tabulation (*supra*, pp. 8-9) there was no testimony as to what the pickets consisted of, who they were, how many pickets there were and, indeed, what they were picketing about (154).

In response to these objection (155) the Court overruling them and receiving the exhibit in evidence said:

> "If the question as whether the type of pickets they were, and who they were, were determinative of the issues in this case, there may be some weight to your contentions. *I will hold that they are not.*"

The only further evidence was testimony by Department of Sanitation employee that few employees reported for work on February 2 and a larger number reported for work on February 7 and 8, and that a few reported on February 9 and 10 (155-158).

The Court immediately found the Union guilty of criminal contempt, imposed upon it the maximum fine of $80,000 and the maximum forfeiture of its Union dues check-off rights for an eighteen month period (221-226; 17-25).

Presentation of the Federal Questions

The Federal constitutional questions were raised during the trial (76-77, 111, 112, 129), upon appeal to the Appellate Division of the New York Supreme Court, a court of intermediate appellate review, and in the New York Court of Appeals as reflected in the Opinion of the New York Court of Appeals and the memorandum of the concurring Judges (23 N.Y. 2d at pp. 179, 185, 187, 188; App. A) and the Order of that Court upon a motion to amend the remittitur (App. C-1, p. 9a).

The Federal Questions are Substantial

1. It is an unconstitutional denial of equal protection of the laws and due process for a State to accord the absolute right to jury trial for all defendants in criminal or civil contempt proceedings arising out of violations of labor dispute injunctions generally and at the same time deny such right to a jury trial in a criminal prosecution for contempt of a labor dispute injunction only where the labor dispute involves public employees.

A.

It would be difficult to conceive, of a more invidious and unreasoned discrimination denying equal protection of the laws than that here presented.

New York State has provided by two separate statutes that no defendant in a contempt proceeding arising out of a claimed disobedience of a "labor dispute" injunction can be convicted except after trial by jury, to which he is "entitled as a matter of right" (Judiciary Law § 753-a; and Labor Law § 808, App. E, pp. 25a-26a; 28a-29a).

And the New York Constitution (Art. I, § 2; App. E, p. 17a) forbids a waiver of trial by jury of a defendant in a criminal case, except by a written instrument executed in open court and approved by the Justice presiding.

Although neither statute expresses any exception to its provisions and the term "labor dispute" is broadly defined to embrace any controversy of any kind or nature arising out of a dispute between employer and employee relating to employment conditions, collective bargaining or the competing interests of employer and employee, the New York State Courts in this case have so construed those statutes as to exclude from their protection a single class of persons: public employees. Such persons (and their unions and union officers), even though, as in the instant case, they perform work identical to that performed by private employees and under conditions identical to those of private employers and even though the criminal contempt prosecution arose out of an asserted violation of labor dispute injunction, are deprived of the right to jury trial accorded to all others.

B.

It is manifest that what was involved here was a labor dispute, an anti-strike injunction and a prosecution for criminal contempt for the disobedience of that injunction.

Appellants are a union and an officer of a union whose members are employees of the New York City Department of Sanitation. Their tasks are the sweeping of streets and the collection of rubbish—functions typically, indeed generally—performed by private cartmen and their employees all over the country and, in point of fact, even in the City of New York. (See N.Y.C. Administrative Code §B32-267.0, *et seq.*)

It is for the alleged violation of a labor dispute injunction issued to enjoin the continuance of a work-stoppage by such employees that appellants were prosecuted and appellants DeLury and union were convicted, after trial by a

Court without jury, and were punished for criminal contempt. And it is from these convictions that appellants are appealing to this Court.

C.

Under New York law (N. Y. Constitution Art. I, § 2, App. E, p. 17a) when, in a criminal prosecution, a defendant is entitled to trial by jury, that right can be waived in one way only: "by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction". See also, *People* v. *Duchin,* 12 N.Y. 2d 351. It is unquestioned that there was no such waiver of the right to trial by jury here and the New York Court of Appeals, in addressing itself to appellants' argument that they were entitled to a jury trial in the absence of such a waiver, obviously concluded that the cited New York Constitutional provision applies here (23 N.Y. 2d at pp. 187-188; App. A).

In an appeal argued shortly after, but decided shortly before the instant case, the New York Court of Appeals (3 of the 7 Judges dissenting), held that neither Judiciary Law § 753(a) nor Labor Law § 808 applies to prosecutions for criminal contempt arising out of labor disputes involving public employees and that defendants in such prosecutions are not entitled to trial by jury (*Rankin* v. *Shanker,* 23 N.Y. 2d 111, App. B).

In the instant case the New York Court of Appeals reiterated and applied that ruling; the Judges who dissented in *Shanker* concurring in the instant case "on constraint" of that decision "insofar as the right to a jury trial is concerned" (23 N.Y. 2d at p. 188, App. A).

Upon this aspect of our appeal here we thus address ourselves to the error inherent in the majority opinion of the New York Court of Appeals in *Shanker,* as applied here.

We start with the basic premise, so often stated by this Court, that the Equal Protection clause of the 14th Amendment forbids invidious discrimination and commands that all persons be accorded equally the protection of equal laws.

"The purpose of the clause in respect of equal protection", this Court observed in *Frost* v. *Corporation Commissioners*, 278 U.S. 515, 522, "is to rest the rights of all persons upon the same law under similar circumstances."

And more recently (*Reynolds* v. *Simms*, 377 U.S. 553, 565):

> ". . . the concept of equal protection has been traditionally viewed as requiring uniform treatment of persons standing in the same relation to the governmental action questioned or challenged."

Particularly is this so in regard to prosecutions which are to end in the imposition of penal sanctions. For this Court, tracing the quest for equality before the law back to the pledge of Magna Charta, observed in *Griffin* v. *Illinois*, 351 U.S. 12, 17:

> "In this tradition, our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court' *Chambers* v. *Florida*, 309 U.S. 227, 241."

A recent application of the Equal Protection Clause by this Court is, we submit, controlling here.

In *Baxtrom* v. *Herold*, 383 U.S. 107, this Court held invalid as a denial of equal protection a pattern of statutes dealing with the commitment of dangerously mentally ill persons. Under those statutes, in the instance of persons

in such a category generally, a jury trial was provided by statute on the issue of their insanity and a judicial procedure was required for a determination of their dangerous character preliminarily to their being incarcerated in an institution under the jurisdiction of prison authorities. In the instance of persons who had become insane during imprisonment and had reached the end of their imposed prison sentence, no jury trial was provided for a determination of their mental illness and no judicial determination that such person was dangerous to the community was required before his incarceration in an institution under the jurisdiction of prison authorities.

This Court unanimously held that each aspect of the pattern of laws constituted an unconstitutional denial of equal protection of the laws, in an opinion by the Chief Justice, the terms of which are directly applicable here.

It would seem difficult, in the light of the foregoing, to justify the result from which we are appealing here.

The criminal contempt—which Justice White observed in *Bloom* v. *Illinois*, 391 U.S. 194, 201 is "a crime in every fundamental respect"—occurred here upon the claimed disobedience of the labor injunction order. The situation then became fixed and determined. As in the instance of any other crime, all that remained was for the defendants to be charged and tried. Their position under the law was precisely identical to that of the violator of any other labor injunction order. To paraphrase the Chief Justice in *Baxstrom, supra* (383 U.S. at p. 111) "For the purpose of granting judicial review before a jury on the question of" guilt, "there is no conceivable basis for distinguishing" between the violation of one labor injunction order and another, and it follows that "the State having made" a jury trial "generally available" in labor injunction contempt prosecution, it "may not consistent with the Equal Protection Clause of the Fourteenth Amendment arbitrarily withhold it from some."

D.

The New York Court of Appeals in the instant case rested the denial of the right to jury trial to appellants' Union and the president of the Union upon the single basis that the labor injunction for the violation of which they were prosecuted for criminal contempt arose out of a labor dispute between public employees and their employer, the City of New York. In *Shanker* (23 N.Y. 2d 111, App. B), the reasoning of which the New York Court of Appeals incorporated by reference in its opinion in the present case (23 N.Y. 2d 175, 178, 186, 187; App. A), that Court determined that New York Judiciary Law § 753(a) and New York Labor Law § 808 which expressly grant trial by jury "as a matter of right" in all prosecutions for contempt arising out of the disobedience of an injunction order granted "in any case involving or growing out of a labor dispute" is not applicable when the labor dispute is one between a public governmental agency and its employees. Having reached that conclusion, it recognized that under the Equal Protection Clause it was necessary for it to justify its exclusion of public employees and their unions and union officers from the benefits of a law providing trial by jury in a labor injunction case generally, upon the ground that such exclusion constituted an appropriate classification. The basis of the classification, absent from the terms of the statute but read into it by the majority of the New York Court of Appeals, was (23 N.Y. 2d at p. 117, App. B):

> "Prompt determinations, unencumbered by the long, drawn-out procedures involved in a jury trial are needed in criminal contempt proceedings in order to deter the continuance of paralyzing public strikes by visiting speedy punishment on the defendants."

Judges Keating, Bergan and Burke, in their dissenting opinions in *Shanker* demonstrate the error of the majority of the New York Court of Appeals.

Judge Burke, after first pointing out that the statutes "clearly intended that public employees and their representatives should have the right to trial by jury" in contempt proceedings arising out of labor disputes, continued (23 N.Y. 2d at p. 127; App. B):

> "But, an additional issue is raised by the contrary construction of those statutes. The issue is of a constitutional dimension since it involves a purported statutory discrimination between public and private employees in relation to their respective rights to such a jury trial. Initially, it should be emphasized that public employees, qua public employees, are not to be regarded as inhabitants of a constitutional limbo in which they are relegated to a 'watered-down version of constitutional rights.' (*Garrity* v. *New Jersey*, 385 U.S. 493, 500; *Keyishian* v. *Board of Regents*, 385 U.S. 589.) Furthermore, this proposition remains true even in the face of the dire perils of strikes by public employees. A teacher no more forfeits his constitutional rights when it is alleged that he is engaged in an illegal strike than does any individual citizen forfeit them when it is alleged that he has committed some heinous crime. We harbor no doubts as to the very serious character of the threat to the public inherent in strikes by public employees. It is precisely in times when the public interest is so seriously threatened that courts must heed the caution voiced by Chief Judge Cardozo: 'Historic liberties and privileges are not to bend from day to day "because of some accident of immediate overwhelming interest which appeals to the feeling and distorts the judgment" * * * are not to change their form and content in response to the "hydraulic pressure" * * * exerted by great causes.' (*Matter of Doyle*, 257 N.Y. 244, 268, quoting Holmes, J. in *Northern Securities Co.* v. *United States*, 193 U.S. 197, 400-401)."

Dealing with the Equal Protection Clause aspect, he pointed out the weakness of the majority opinion's classification argument, noting (23 N.Y. 2d at pp. 128-9; App. B):

> "Thus, a classification of unions and their members in terms of their employment in the public, as against the private, sector may well be reasonably related to a legislative objective of prohibiting strikes which interfere with essential public services. We are here faced, however, not with legislation barring strikes by public employees but with legislation which, *as construed*, denies a jury trial in a criminal contempt proceeding against public employees arising from the alleged violation of a court order issued in a labor dispute with a governmental employer, but which grants such a jury trial to employees in the private sector who are also charged with violating a court order. Each is charged with the same violation and the fact that one is employed by the Board of Education, while the other is employed by some private educational system or institution, has no bearing whatever on the procedural method by which his accountability for the alleged violation is to be determined. Is there any governmental interest which requires that the Board of Education employee have his guilt or innocence determined by a Judge without a jury, whereas the employee of the private educational system or institution may have his guilt or innocence determined by a jury? No such interest has been demonstrated in this case and characterizations of the jury-trial process as 'long' and 'drawn-out' cannot serve to supply such an interest."

Finally, dealing with the conclusion of the majority that the threat of "speedy punishment" by deprivation of a jury trial advances the cause of labor tranquility among public employees and, therefore, provides a proper basis for a classification depriving public employees alone of the benefits of a jury trial in a labor injunction case, Judge Burke pointed out that experience has shown that jailing union leaders has no such deterrent effect and on the contrary might tend to prolong a strike of public employees (23 N.Y. 2d at p. 129; App. B).*

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* Judge Keating, in his opinion 23 N.Y. 2d at p. 134 (n), (App. B) also noted that "the lack of a jury trial did not speed the end of the strike for in that case as well as others the strikes continued."

Judge Keating, in his dissenting opinion, pursued Judge Burke's observations and rested his conclusion "primarily on the constitutional question" of Equal Protection involved, and observed (23 N.Y. 2d at pp. 132-3; App. B):

> "The 'equal protection' clause stands as a guardian and protector of minorities of every kind against every form of irrational discrimination. It is manifestly far easier, politically, to pass legislation which touches adversely only a small group. The 'equal protection' clause seeks to control this tendency by requiring the Legislature to extend its classification to all persons or groups fairly within the legislative policy. Justice Jackson in his concurring opinion in *Railway Express* v. *New York,* (336 U.S. 106, 112-113) recognized this fundamental purpose of the 'equal protection' clause when he wrote: 'The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.'
>
> Later on in the opinion he summarized his views in a particularly apt phrase: '[W]e are much more likely to find arbitrariness in the regulation of the few than of the many' (336 U.S., p. 113)."

Judge Keating described the real question in the case upon this aspect in terms which compel the conclusion that a clear violation of Equal Protection resulted from the majority decision here. Thus (23 N.Y. 2d at p. 133; App. B):

> "The question is not whether public employees differ from private employees or whether the former

> may not strike, while the latter may, but whether the differences between them are pertinent to the subject with respect to which the classification is made, to wit, the right to trial by jury (*Baxstrom* v. *Herold*, 383 U.S. 107, 111). More precisely, the issue here is whether the denial of a jury trial is necessary to the vital functioning of the Taylor Law. The 'one vital reason' offered by the majority to justify the lack of a jury trial requirement, where public employees or their representative organizations are involved, is an alleged need for 'Prompt determinations' 'in criminal contempt proceedings under the Taylor Law' 'unencumbered by long, drawn-out procedures involved in jury trials' 'in order to deter the continuance of paralyzing public strikes by visiting speedy punishment on the defendants.' (Majority opn., p. 117.) In contrast to almost every other criminal statute, however, the Taylor Law postpones the enforcement of all of its penalties against the union until after all appeals are exhausted (Judiciary Law, § 751, subd. 2, par. [d], cl. [i]. While it is conceivable that the appellate process could terminate prior to the end of the strike, this has yet to happen. Therefore, in the case of the union, the purported justification for denying a jury trial has no application at all.''

Rejecting the conclusion of the majority that this Court in the *United Mine Workers* case had ruled inapplicable to labor disputes involving public employees the jury-trial provisions of the Norris-La Guardia Act (29 U.S. Code §§ 101-113) from which the New York statutes here involved were derived, Judge Keating observed (23 N.Y. 2d at p. 133; App. B):

> ''In the case upon which the majority rely (*United States* v. *United Mine Workers*, 330 U.S. 258, 298), the 'equal protection' point was not even raised. Moreover, the case was decided in a day when the importance of the 'equal protection' clause, as a vital tool in the preservation of a just society, was only then beginning to be felt.''

In terms directly applicable here—the employees involved being removers of garbage, a task commonly, indeed, predominantly carried out by private employees—Judge Keating concluded (22 N.Y. 2d at p. 134, App. B):

> "When it is remembered that employees of private utilities have the power to plunge one of the great cities of the world into total darkness or complete silence, that employees of privately owned railroads and shipping lines have the power to deprive the residents of that city of vital food and fuel, that private sanitation workers, who carry away a substantial portion of the refuse in New York City, have the power to endanger the health of millions of its inhabitants and that thousands of other workers, carrying out activities vital to the life and safety of the city, may demand a trial by jury if they are charged with violation of a court order restraining a strike, the fallacy in the reasoning which would deny a jury trial to these defendants is readily exposed. References to the dangers to the children from the teachers' strike, real as those dangers may be, are not a substitute for a penetrating analysis of the labels 'public' and 'private' employees. In my view, the 'public'-'private' distinction cannot be maintained, as a constitutionally viable difference with respect to the right of a jury trial."

Little need be added to what is set forth in the dissenting opinions in *Shanker* except to note that this Court, particularly in recent years, has rejected attempts to relegate public employees "to a watered-down version of the Constitution", *Garrity* v. *New Jersey*, 385 U.S. 493, 500. It has repeatedly held that public employees "are entitled like all persons to the benefit of the Constitution". *Uniformed Sanitationmen's Ass'n* v. *Commissioner of Sanitation*, 392 U.S. 280, denounced the notion that public employees, *qua* public employees have a lesser claim upon the protection of the Fourteenth Amendment than citizens generally, and struck down statutes which hampered or discouraged the assertion by them of constitutional privi-

leges. *Slochower* v. *Board of Education,* 350 U.S. 551; *Wieman* v. *Updegraff,* 344 U.S. 183; *Garrity* v. *New Jersey, supra; Uniformed Sanitationmen's Ass'n* v. *Commissioner of Sanitation, supra; Gardner* v. *Broderick,* 392 U.S. 273; *Spevak* v. *Klein,* 385 U.S. 511. Significantly, in those cases this Court had occasion to reject attempted justification of such discrimination upon the basis of "the States' interest in the loyalty of those in its service" (*Slochower* v. *Board of Education,* 350 U.S. at p. 555). If such an invidious classification cannot survive in the case of policemen and school teachers, it is hard to see how it can be applied to garbage removers.

Whether a person be employed by a municipal corporation or by a commercial corporation to dispose of rubbish would seem, on its face, a distinction without a difference in his right to equal treatment in prosecutions for crimes. His disputes with his employer have the same quality whether he works for one or the other. His union and its officers have the same purposes. But even more to the point of exact identity, is the standing, the character, the very nature of the position of his union and its officers when they are tried for criminal contempt arising out of the violation of a labor dispute injunction; whether the members of such union are public or private employees is then an irrelevancy. And if, as is the case here, the State accords to unions of private garbage collectors' employees the right to jury trials for both civil and criminal contempts of labor injunctions it must in all reason provide a similar right of trial by jury to the union and officer of a union of public garbage collectors for criminal contempt arising out of their labor disputes.

Any other conclusion does violence to "the central aim of our entire judicial system—all persons charged with crime must . . . stand on an equality before the bar of justice in every American Court" (*Griffin* v. *Illinois,* 351 U.S. 12, 17).

Finally, the suggestion of the majority of the Court of Appeals that public convenience justifies the discrimination against public employees inherent in the statutes as construed by the majority to exclude them from the right to trial by jury in labor injunction criminal contempt proceedings, is directly at variance with the principle, so often expressed by this Court, that convenience and expediency are no grounds for denial of Equal Protection.

For, as this Court said in *Reid* v. *Covert*, 354 U.S. 1, 14:

> "The concept that . . . constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefits of a written Constitution and undermine the basis of our Government."

2. A trial for criminal contempt is in all respects a criminal prosecution to which all the exacting requirements designed to protect a defendant apply. Those requirements were ignored here.

Under New York statutory law neither a union nor a union officer can be held responsible for a crime, at law or in equity for unlawful acts in a labor dispute except upon proof "without the aid of any presumption of law or fact" of its or his performance of such acts and of its or his "actual participation in or actual authorization of such acts." Here there was completely absent any direct evidence of such conduct by either the appellant Union or by appellant DeLury and the refusal of the New York courts to apply that statutory measure of proof and their exception of labor disputes of public employees from its purview constitutes a denial of equal protection of the laws.

A.

Whatever doubt existed upon the question of whether a criminal contempt is a crime in the ordinary sense and whether a proceeding to punish for criminal contempt is in every respect a criminal prosecution, has now vanished

under the impact of this Court's recent decision in *Bloom* v. *Illinois,* 391 U.S. 194.

When the record here is examined in the light of that circumstance, it is manifest that the result achieved so far cannot stand. We note at the outset, that the defendants, although faced with a very serious criminal charge, were forced on trial upon less than twenty-four hours' notice, in plain violation of the Constitution (*Bloom* v. *Illinois, supra,* 391 U.S. at p. 205), over the vigorous protest of their counsel who pleaded that it was "impossible" for him to make adequate preparation "in such a short period of time" (see *supra,* p. 7), and were tried by a Justice who manifested from the outset a predisposition to find the defendants guilty and a clear intention to hurry the trial along to the result he had foreordained and apply the punishment he was intent upon inflicting (see, *e.g.* 21, 76-77, 79, 81, 149-152). But more significant, the resulting convictions were —and could only be—achieved by, in plain violation of the Equal Protection clause, denying to these defendants the benefits of a statute, applicable to defendants generally in prosecutions for violation of labor injunctions, requiring a special and exacting degree of proof of guilt, upon the sole apparent ground that the labor dispute here involved public employees.

Three signal facts must be noted here:

1. Neither appellant DeLury nor appellant Union nor any other officer of the Union called, counseled or instigated the work stoppage: on the contrary, appellant DeLury, the responsible officers of the Union and the Union itself all struggled and urgently counseled *against* strike or work stoppage action.

2. The work stoppage occurred and was fully in effect, as a spontaneous action of plaintiff's employees, *long before* any injunction or restraining order was issued.

3. With the sole exception of appellant DeLury, charges of criminal contempt, asserted against all officers of the union by the City, were dismissed by the Trial Justice, and no appeal has been taken by the City from such dismissal.

B.

We start with the proposition recently reiterated by the Supreme Court in *Bloom* v. *Illinois,* (391 U.S. at p. 205 that "it is certain that in proceedings for criminal contempt the defendant is presumed innocent, he must be proved guilty beyond a reasonable doubt".

Under New York statutory law the weight, the character and quality of evidence necessary to support a conviction in a trial arising out of a labor dispute are all specially prescribed. New York Labor Law, § 807[6] (App. E, p. 27a) provides:

> "No officer or member of any association or organization and no association or organization participating or interested in a labor dispute (as these terms are herein defined) shall be held responsible or liable in any civil action at law or *suit in equity* or in any *criminal prosecution,* for the unlawful acts of individual officers, members, or agents, except upon proof by the weight of evidence *and without the aid of any presumptions of law or fact,* of (a) the doing of such act by persons who are officers, members or agents of any such association or organization, and (b) actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof by such association or organization."

That statute was derived from a section of the Norris-LaGuardia Act (29 U.S.C. § 106), whose provisions have been liberally interpreted in favor of both unions and their officers (See *e.g., United Brotherhood of Carpenters* v.

United States, 330 U.S. 395; *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 735-42).* Yet, although it would seem on its face to be directly applicable here, the New York courts, in plain violation of the Equal Protection clause, failed and refused to apply it upon the apparent ground that it has no application to proceedings arising out of labor disputes involving public employees.

Subdivision 6 of Labor Law § 807, although part of a section whose other provisions relate to limitations upon the *issuance* of injunctions in labor disputes, is not limited to such matters, but on the contrary, as Justice Botein observed in *Lubliner* v. *Reinlib,* 184 N.Y. Misc. 472, 477 (1944)—the leading case upon this subject—"is not restricted to questions arising from the issuance of injunctions in labor disputes", but, like its Federal counterpart, which is a statute separate from and independent of the Federal anti-labor-injunction statute, states a separate, substantive rule applicable in all prosecutions and all proceedings at law and in equity.

As Justice Botein in the cited case observed (*id.* 481):

> "It will also be noted that subdivision 6 recurrently employs the words 'actual participation' * * * authorization 'or ratification' in conjunction with 'unlawful *acts*'. I interpret this association of words to mean that not only is *actual* authorization or ratification required, i.e., by means of some express action or declaration by the union, but also that the authorization, participation or ratification must be of the particular acts complained of and not of a general line or course of conduct. * * * It is evident that protection beyond that of the ordinary rules, governing vicarious agency liability is here required and contemplated. The seemingly studied reiteration of the words 'actual' and 'acts', as above quoted, and the

* Labor Law § 807[6] actually inposes a *greater* burden of proof than its Federal counterpart, since, unlike 29 U.S.C. § 106, it prohibits the use of "any presumptions of law or fact," in addition to requiring proof of "actual participation" or "actual ratification".

> *statutory prohibition against the plaintiffs* invoking *presumptions of law or fact,* set a substantive standard of proof which cannot be met even prima facie by allegations from which the most that can be gleaned is that a tortious act by an officer flowed from a general course of action authorized by the union."

That the subject matter of the claimed criminal contempt arose directly out of a labor dispute cannot be gainsaid, since it patently involves "terms and conditions of employment" and a "controversy arising out of the respective interests of employer and employee" and concerns "employment relations" (Labor Law § 807, subd. 10; App. E, pp. 27a-28a).

It is in this light that the record here must be examined and when so examined it is manifest that there was a complete failure of proof to sustain the convictions appealed from. For, in regard to both appellant DeLury and appellant Union, there is literally no evidence to support their convictions of criminal contempt of court. At most, there are fragments and bits of information which neither taken singly nor added together amount to a scintilla of evidence supporting the findings upon which the criminal contempt Orders and Mandates rest their validity.

Although this fragmentary material, if proved would fall far short of constituting sufficient evidence to sustain the convictions appealed from, we will address ourselves to it and show that even those fragments were not proved.

The sole ground upon which Mr. DeLury was convicted was (15) that he "wilfully disobeyed lawful mandates of this Court . . . *in that . . . he failed to instruct any member of* [*the Union*] *not to engage or participate in* a strike" (Order and Mandate, ¶ 6).

It must be remembered that at the same time and upon identical proof in this respect, every other officer of the Union was acquitted of the identical charge laid against them (14, 84, 112).

There is not an iota of evidence in the record that appellant DeLury had the slightest power to—or, as we shall show later, that he "failed to"—instruct any [sanitationmen] not to engage in or participate in any strike": the only evidence is directly to the contrary and demonstrates that he opposed the strike, counseled against the work stoppage and, for his pains, lost all power to "instruct" the men in regard to the work stoppage. Yet it is for having assertedly "failed to" so "instruct" them, alone, that Mr. DeLury was convicted and severely punished. This result was achieved despite the oft-repeated holding of our courts that a person "could not be punished for contempt for not doing what he did not have the power to do". *Greenberg* v. *Polansky*, 140 N.Y. App. Div. 326, 328 (1st Dept. 1910). To paraphrase Justice Stewart's observation in *International Longshoremen's Assn.* v. *Philadelphia Mar. Tr. A.*, 389 U.S. 64, 76: "The most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command beyond" a defendant's power of effective obedience.

Long before the injunction was even sought, let alone obtained, the sanitationmen had already engaged upon a work stoppage (*supra*, pp. 7-8, 9, 24). The record demonstrates that in point of fact Mr. DeLury (and the other officers of the Union) struggled and counseled against strike action and could not prevail against a spontaneous action by the sanitationmen (see pp. 5-6, *supra*). How, in such circumstances Mr. DeLury could be expected to effectively "instruct" the men to return to work, defies reason, and that he could be punished for failing to make an empty gesture by not *requesting* the men to return—a far different concept from instructing them—is difficult to comprehend and we submit, impossible to support.

C.

The sole and exclusive evidence offered to support this conclusion that Mr. DeLury "failed" to instruct *any* member [of the Union] not to engage in "strike action" is the following colloquy which took place in the course of the trial (110-111):

> "Mr. Nathan: If this Court please, I have advised Mr. O'Dwyer that the only additional proof which the City would offer would be the testimony of *particular sanitation men** as to whether or not they have received instructions from Mr. DeLury to report back to work.
>
> Mr. O'Dwyer: Your Honor, I think we could save a great deal of time with respect to that.
>
> It is our contention here that if these witnesses were called, they would testify that *they* did not receive any instructions from Mr. DeLury to go back, because Mr. DeLury did not send them out and Mr. DeLury did nothing to bring *them* back. These are the facts which are known to everybody . . . .
>
> The Court: *Well, there is nothing in these papers to indicate that he caused the strike.*"

In the first place, the proffered testimony was limited to "*particular* sanitation men". There is not the slightest evidence that appellant DeLury "failed to instruct *any* member" of the Union "not to engage or participate in a strike." Moreover, the only manner in which the conclusion reached in the Order and Mandate can be supported is by indulging in the inference that since appellant DeLury gave no such instructions to "*particular* sanitation men" he therefore gave no such instructions to "*any*" sanitation men. But such a conclusion falls far short of constituting "proof, . . . without the aid of any presumption of law or fact." as required by statute. Indeed, any such conclusion can be reached only by piling inferences upon presumptions. And entirely apart of the quoted provision of the Labor

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* Apparently, 10 were subpoenaed for this purpose (23 N.Y. 2d at p. 181 note 4; App. A).

Law, such evidence is far from amounting to proof of guilt "beyond a reasonable doubt" and cannot support a conviction of criminal contempt.

There is, in short, not a scrap of evidence in the record to support the conviction of appellant DeLury. As Justice Black, writing for the entire Court in *Thompson* v. *City of Louisville,* 362 U.S. 199, 206 observed, "it is a violation of due process to convict and punish a man without evidence of his guilt."

D.

What we have said above in regard to appellant DeLury applies equally to appellant Union. For the evidence submitted to support the conviction of the Union for criminal contempt falls so far short of proof of guilt "beyond a reasonable doubt" as to constitute no evidence at all, and, in addition is drastically lacking in the qualities of the requisite proof dictated by the above-cited statute.

Again, it is of utmost significance that, as we have shown (*supra,* p. 9) every single officer of the Union who was charged with criminal contempt was acquitted, except DeLury.

The acts purported to constitute criminal contempt on the part of the Union are specified in the Order and Mandate in twenty-one separate items, only six of which directly charge activity to the Union itself (Items 10, 11, 12, 13, 14 and 21; R. 21-24). The other items relate to individual members of the Union (20-21), to a particular officer of the Union (20-21), or to formal matters charging no acts by the Union (20-21, 23-4).

Items 10 and 12 (21-2) "adjudges and decrees" that on eight days picketing activities "were conducted by the defendant Union". The sole claimed proof as to this item is so blatantly hearsay and so totally inconclusive as to lack the quality of even fragmentary evidence. It consists of a series of papers bearing date February 2, February 3,

February 4, February 5, February 6, February 7, February 8, February 9, and February 10, 1968 (Plaintiff's Exhibits 2 and 3), each entitled "Memorandum for the Police Commissioner" containing the legend "Sanitation Department Locations Being Picketed" and noting "Patrol borough commands report that . . . the following Sanitation Department locations are being picketed", and purported to list such locations. The theory upon which the Court accepted these "exhibits" was that they assertedly had been made in the regular course of business—a notion which constitutes at once an affront to the constitutional requirement that a defendant is entitled to confront accusers and violation of the hearsay rule (see, *e.g.*, *Yung Jin Teung* v. *Dulles*, 229 F. 2d 244, 2 Cir. 1956). But even if that were not so, those "exhibits" bear not a line or indeed a word to indicate who was doing the picketing, under what auspices the picketing took place or at whose direction the picketing occurred. For all that the record here shows, even if the exhibits were admissible, as clearly they are not, the picketing might have been conducted by persons totally unrelated to the Union or to its members and for purposes totally alien to those of the Union or of its members. The evidence, in short, completely fails to support the determination reached by the Court. Here again, it is only by piling inference upon presumptions of fact and imagining facts not in the record—in direct violation of Labor Law § 807 [6]—that the conclusion of the Court could possibly be justified. Clearly this proffered proof falls far short of any common law proof, let alone proof "beyond a reasonable doubt" or the kind of proof commanded by the statute above-cited.

Item 11 of the Order and Mandate (22) concludes that the "said picketing activities were conducted by the defendant Union" for the purpose of interfering with the performance of duty of City employees causing them to refuse to work and inducing them to strike. Here again there is not an iota of proof to support any such conclusion.

Item 13 (22-3) concludes that "defendant Union" disobeyed the restraining order and preliminary injunction in that "defendant Union failed to instruct any member of the Union not to engage or participate" in the strike action, and "failed to refrain from engaging in, causing, instigating, encouraging or condoning or lending support or assistance" to a concerted work stoppage. *There is literally no evidence at all to support this conclusion.* There is not a word of evidence that the Union instigated or encouraged or condoned or lent support or assistance of any nature to the strike action. The only evidence is precisely to the contrary: that is, to the effect that the Union and its officers actually and affirmatively counseled the men *not* to engage in strike action and urged them vigorously *against* the work stoppage upon which they spontaneously —and in violation of the Union Constitution—engaged upon. The only evidence even relating to that part of the conclusion charging the Union with failing to instruct "any member" of the Union not to engage in strike action, is a colloquy of counsel set forth above (p. 29) in regard to the appellant DeLury which, in the first place, is *limited* to the actions of the *appellant DeLury* and does *not* extend to the Union itself; and in the second place, related only to proposed and conceded testimony of "*particular* sanitation men". In short, there is not a scrap of evidence which by any straining of reasoning could support the conclusion, entirely apart from the fact that a finding of guilt can only ensue upon proof "beyond a reasonable doubt" and entirely apart from the quoted requirements of the Labor Law which impose upon the plaintiff the task of demonstrating participation and activity by the Union "without the aid of any presumptions" and proof of "actual participation", "actual authorization . . . or ratification" and "after actual knowledge" by the Union.

Upon this flimsy, totally unconvincing record, bereft of even a modicum of proof, let alone the requisite "proof beyond a reasonable doubt" required by law and totally

lacking the qualities dictated by the above-cited statute, appellant DeLury was jailed and fined and defendant Union suffered a fine of $80,000 and a cancellation of its check-off privileges designed to cripple it in its normal operations. Here again, apart from all else, we have a conviction "without evidence of guilt"; a plain "violation of due process". *Thompson* v. *City of Louisville, supra.*

E.

Manifestly, the convictions for criminal contempt here could not be sustained if there was applied to the record the exacting standards of direct proof "without the aid of any presumptions of law or fact" of "actual participation" and "actual authorization" by appellant Union officer and Union, commanded by New York Labor Law § 807 [6], (App. E, p. 27a). See *United Brotherhood of Carpenters* v. *United States,* 330 U.S. 395, 403. Although the opinion of the New York Court of Appeals does not explicitly so state, there is plainly implicit in both the opinion here and the majority opinion in *Shanker,* a determination that Labor Law § 807 [6], like Judiciary Law § 751-a and Labor Law § 808—all of which were urgently pressed in the New York courts by appellants—does not apply in trials for offenses arising out of labor disputes involving public employees.

What we have already said above (pp. 11-23) in regard to the exclusion of public employee unions and their officers from the jury trial provisions of Judiciary Law § 751-a and Labor Law § 808 applies *a fortiori* here. For, impossible as it is to justify that discrimination in regard to jury trials upon the ground of need for "speedy punishment", even that improper ground does not exist in regard to the quality and measure of proof required to achieve conviction, and invidious classification for such purposes which discriminates solely against public-employee unions and their officers in criminal contempt trials arising out of labor injunctions, verges on the irrational. *Baxtrom* v. *Herold,* 383 U.S. 107; *Rinaldi* v. *Yeager,* 384 U.S. 305.

3. Article 14 of the New York Civil Service Law unconstitutionally deprived the appellants of liberty and property without due process of law, by prohibiting them from striking, and by commanding them to continue to work for the Government of the City of New York against their will, without making any provision for payment of just compensation for such continued involuntary labor.

(a) A peaceful strike is not unlawful.

The only kinds of strikes by workers in private industry that have been declared unlawful by statute, or by judicial decisions, have been strikes for purposes that were not directly and immediately related to the wages and working conditions of the strikers, or in which the strikers conducted their strike by actions which were illegal at common law, or by actions which were prohibited by statute.

Thus a strike to collect disputed back wages (*Dorchy* v. *Kansas*, 272 U.S. 306); mass picketing and threats of violence during a strike (*Allen-Bradley Local* v. *Wisconsin Board*, 315 U.S. 740); a sit down strike (*Labor Board* v. *Fansteel Corp.*, 306 U.S. 240); a seamen's strike aboard ship away from home port (*Southern S.S. Co.*, v. *Labor Board*, 316 U.S. 31); a strike that breached a valid collective bargaining contract not to strike (*Labor Board* v. *Sands Mfg. Co.*, 306 U.S. 332): a secondary boycott (*Duplex Co.* v. *Deering*, 254 U.S. 443); causing frequent unannounced work stoppages (*Auto Workers* v. *Wisconsin Board*, 336 U.S. 245); and picketing to compel an employer to make a collective bargaining contract with a union, after the employees had voted not to be represented by such union (*Building Service Employees Union* v. *Gazzam*, 339 U.S. 532); have been deemed strikes for an illegal purpose, or by illegal means.

A peaceful strike for higher wages and improved working conditions has not been held unlawful in any case involving workers in private industry. Instead, the right of workers in private industry to strike for such purpose

has been recognized by statutes and by judicial decisions; 29 U.S.C. section 163; *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383, 390; and injunctions against peaceful strikes for such purposes have been prohibited by the Clayton Act, and by the Norris-La Guardia Act, and by similar laws in the State of New York. 29 U.S.C. sections 52, 101; McKinney's New York Labor Law section 807.

Even where violence and other unlawful acts by strikers were enjoined, the injunction did not "restrain the defendants from abandoning whatever employment they were engaged in." *In Re Debs*, 158 U.S. 564, 598.

In 1947, Senator Taft stated his reasons for proposing no statutory limitations on freedom of workers in private industry to strike for improved wages and conditions of employment, as follows (93 Cong. Rec. 3835):

> " * * * we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions, when a contract has expired and neither side is bound by a contract. We recognize that right in spite of the inconvenience, and in some cases perhaps danger, to the people of the United States which may result from the exercise of such right. ***So far as the bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining. We have done nothing to outlaw strikes for basic wages, hours, and working conditions after proper opportunity for mediation."

(b) Peaceful strikes can be regulated by statutes providing for a temporary injunction, and a duty to continue collective bargaining, aided by mediation, to promote agreement between employers and workers, and thereby to reduce strikes.

The Taft-Hartley Act and the Railway Labor Act regulate but do not prohibit strikes by workers in private industry. They require labor unions and employers to give each other 60 days written notice preceding any proposed modification or termination of a collective bargaining con-

tract; to offer to meet and to negotiate thereon; to notify the appropriate governmental mediation services of existing disputes; and to continue to work without any strike or lockout during such sixty day period. 29 U.S.C. section 158; 45 U.S.C. sections 159-160.

Even where a threatened strike or lockout may create a national emergency, the statute only delays the strike for 80 days to afford time for investigation and mediation of the dispute; but if no settlement is reached during such 80 day cooling off period, the employees are free to strike. 29 U.S.C. sections 174-180; *Seafarers International Union* v. *United States,* 304 F. 2d 437, certiorari denied, 307 U.S. 924.

In *United Steelworkers* v. *United States,* 361 U.S. 39, 43, this Court sustained the constitutionality of the Taft-Hartley provision for an 80 day injunction against a strike which imperils the national health or safety (29 U.S.C. § 178). This Court said that the statute "does recognize certain rights in the public to have unimpeded for a time production in industries vital to the national health or safety"; that it "makes the United States the guardian of these rights in litigation"; and that it provides "a public remedy in time of emergency *** in the common judicial form of an injunction."

The essential difference between an anti-strike injunction under the Taft-Hartley law, and under the Taylor law, is that the Taft-Hartley law commands the Court to discharge the anti-strike injunction after 80 days, (29 U.S.C. §180), whereas the Taylor law anti-strike injunction is permanent.

A Taft-Hartley injunction allows labor unions to negotiate with employers for a satisfactory collective bargaining agreement during the 80 days when the injunction bars them from striking, without destroying or reducing the union's bargaining power, because the employer knows that

the union will be free to begin or to resume a strike at the expiration of the 80 day injunction; and this factor coupled with the statutory duty to continue to bargain collectively, tends to promote labor peace and uninterrupted operations in inter-state commerce.

In contrast, a permanent anti-strike injunction under the Taylor law destroys the bargaining power of a union of governmental workers, and thereby renders it incapable of bargaining on equal terms with representatives of a governmental employer, who have no practical need or compulsion to agree on any collective bargaining terms with a union whose members can not lawfully withhold their labor by going on strike. Moreover, the public officials are subject to counter pressures by Chambers of Commerce and other groups representing the propertied classes in the community, for economy in government, at the expense of the workers. These factors militate against agreement on wages and conditions of employment, and they tend to promote strikes and stoppages of governmental operations.

(c) A peaceful strike against the government is not unlawful.

The Taylor law does not follow the policy of regulating temporarily, but not prohibiting permanently, strikes for improvement in wages and conditions of employment. Instead, it permanently prohibits strikes against the government of the State of New York, or its civil divisions or agencies, for any purpose, or by any means whatever.

The claimed justification for singling out governmental workers for application of a no strike law to them, but not to non-governmental workers, is that strikes which deprive the public of essential services coerce legislative appropriations to meet wage demands made by the strikers; that the strikers' wage demands may be disproportionate to their services and to the public funds available for allocation by annual expense budgets; and that thereby such strikes destroy democratic legislative processes.

But this fiscal and budgetary argument presents the very kind of economic considerations of financial ability to pay wages which are a proper subject of bargaining between employers and workers.

For many years statutes have fixed the wages of blue collar manual workers employed on governmental public works, at the prevailing rate of wages for work in the same trade or occupation (5 U.S.C. §5341; McKinney's New York Labor Law, §220).

These statutes recognize and apply the principle that the government should pay to its workers the fair market value of their labor, based on the wage rates paid by employers in private industry for comparable work. The City of New York is required by law to make provision in its annual expense budget for payment of prevailing rates of wages to manual workers on public works. McKinney's New York Labor Law, §220; New York City Charter §117 (10).

State and municipal legislative bodies which have power to raise money by taxation. can not be said to lack financial ability to pay a wage increase to governmental workers that would give them the fair market value of their labor, merely because no provision therefor was made in the expense budget for the current year, or for the ensuing year.

Economies in government operations should not be made at the expense of government employees by compelling them to contribute more than their own taxes to the cost of governmental operations, by prohibiting them from striking to obtain the fair economic value of their labor.

The record in this case shows that the Sanitationmen's strike did not coerce the City of New York to agree to their demands for a $600 annual wage increase (193).

Before the strike, the City had offered the Sanitationmen a $400 annual wage increase for a one year collective bargaining contract.

On the 8th day of the strike, the Sanitationmen accepted, but the City rejected a recommendation by mediators for a $425 wage increase for a one year collective bargaining contract (199).

On the 9th day of the strike, the Governor proposed that the State shall take over and operate the City's Sanitation Department.

On the 10th day of the strike, the City of New York and the men agreed to binding arbitration in order to avoid State operation of the City's Sanitation Department. The men returned to work that night (157; 208). The Arbitrator awarded a $425 wage increase for a 15 month collective bargaining period.

These facts show that the Sanitationmen's strike did not coerce the City of New York, or disrupt its expense budget in any way.

A strike of governmental workers can not be deemed to have coerced the government, if any practical alternatives are available to deal with the situation resulting from the strike.

Several alternatives were used by the City of New York during the Sanitationmen's strike.

One such alternative used by the City of New York, was to leave the strikers' work undone until the strike ended, by not collecting most of the residential garbage deposited in cans and containers alongside of apartment buildings and small houses. At the same time, the City arranged with the Sanitationmen's Union for union men to remove garbage from City hospitals and from other City institutions (108; 156).

After the strike ended, the Sanitationmen worked overtime for several days and removed all the garbage that had accumulated during the strike.

Another alternative used by the City, was to designate and establish sites on vacant lots throughout the City to which residents could bring their garbage for burning. This procedure was used increasingly by the City during the strike (107-110).

This Court has decided that a legislative finding that the public interest requires continued operation of industries at wage rates fixed by an industrial court, does not constitutionally justify a statutory command that owners and workers shall continue to serve in such industries; and that an obligation to continue in service "can only arise when investment by the owner and entering the employment by the worker create a conventional relation to the public equivalent to the appointment of officers and the enlistment of soldiers and sailors in the military service." *Wolff Packing Co., Industrial Court,* 262 U.S. 522, 541.

The striking Sanitationmen were not in the military service of the State of New York, or the City of New York.

Therefore, the Taylor Law could not constitutionally command them not to strike, nor to continue to work for the City of New York against their will, for less wages than they were willing to accept for their work.

In its brief below, the City of New York said (p. 42) that the Sanitationmen had a "constitutionally protected right to quit work"; but that they "cannot do so by concerted action without violating the statute."

But the Taylor law does not give individual governmental workers any right to quit work. It provides that "No public employee * * * shall engage in a strike * * *." Civil Service Law § 210, subd. 1.

This statutory prohibition applies to each individual public employee, and it prohibits him from quitting work.

Even if the Taylor law shall be construed as allowing individual governmental workers to quit work, its prohibition of strikes would nevertheless unconstitutionally deprive governmental workers of liberty and property with-

out due process of law, because quitting of work by individual governmental workers is not a practical alternative for individuals dependent on steady wages for their daily bread.

Like workers in private industry, governmental workers can effectively induce their governmental employer to make better terms with them only by uniting and quitting in a body. *Cf. American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U.S. 184, 209.

The New York Court of Appeals has said that "when men quit in concert, they offend against the law if their sole and unmixed motive or purpose is to injure an employer," *Reinforce, Inc.,* v. *Birney,* 308 N.Y. 164, 169; that "the genesis which will make a lawful act unlawful must be a malicious one unmixed with any other and exclusively directed to injury and damage of another." *Beardsley* v. *Kilmer,* 236 N.Y. 80, 90; and that the acts complained of must be "without legal or social justification." *Campbell* v. *Gates,* 236 N.Y. 457, 460. See: *American Bank & Trust Co.,* v. *Federal Reserve Bank of Atlanta,* 256 U.S. 350, 358.

The Taylor law did not limit its prohibition of strikes to those in which the sole motive of the strikers was to injure the government.

The record shows that the Sanitationmen's sole motive in striking was to improve their wages and conditions of employment.

The Sanitationmen's actions during the strike in assigning several hundred of their members to remove accumulated garbage from City hospitals and institutions, without pay, shows that their strike was not activated by malicious desire to injure the City of New York (130-131).

It is clear, therefore, that the Sanitationmen's strike was not unlawful by the standards that the State of New York applies to the actions of workers who "quit in concert" in private industry. *Reinforce, Inc.,* v. *Birney, supra,*

308 N.Y. 164. See, also: *Hunt* v. *Crumbach*, 325 U.S. 821, 825.

The decision of the New York Court of Appeals sustained the constitutionality of the Taylor law's prohibition of strikes by public employees, without considering or deciding whether there was any motive or purpose to injure the governmental employer.

Instead, it decided that strikes by public employees can constitutionally be prohibited because they may "deprive the public of essential services," and thus "obtain gains wholly disproportionate to the services rendered by them," with consequent "destruction of democratic legislative processes because budgeting and the establishment of priorities would no longer result from the free choice of the electorate's representatives, but from the coercive effect of paralyzing strikes of public employees." 23 N.Y. 2d at p. 183.

Concerted actions by members of labor unions which have a reasonable connection to improvement of their wages or conditions of employment are not a civil wrong which can be enjoined, or for which civil damages can be recovered, even though such acts cause injury to employers in private industry. *Hunt* v. *Crumbach, supra,* 325 U.S. 821, 824; *Reinforce, Inc.* v. *Birney, supra,* 308 N.Y. 164.

Thus, injury to an employer standing alone, does not itself make unlawful a peaceful strike against an employer in private industry.

The New York Court of Appeals applied a different rule in sustaining the constitutionality of the Taylor law's prohibition of strikes by public employees solely on the ground that they may cause damage or injury to the State or its civil divisions.

But the State can not constitutionally prohibit strikes on the ground that the stoppage of work may cause damage to the public health, safety or convenience, or that it might

damage the interest of the government in continuing its operations without interruption by work stoppages.

In *Motor Coach Employees* v. *Missouri*, 374 U.S. 74, it was decided that a statute pursuant to which the State seized a bus line, after its employees went on strike, did not make "a peaceful strike against a public utility unlawful," in direct conflict with Federal legislation which guarantees the right to strike against a public utility, as against any employer engaged in interstate commerce.

Thus, State seizure and operation of a public utility whose uninterrupted operation is necessary for the public health, safety, or convenience, does not necessarily sustain the constitutionality of a statutory prohibition of a strike or work stoppage by employees of such State seized public utility.

The same result was reached in a case in which a governmental agency purchased a utility from a private owner and operated it as a public utility. *Local 266* v. *Salt River Project*, 78 Ariz. 30, 275 P. 2d 393, 400.

In an analogous case, this Court decided that the Federal Railway Labor Act applies to employees of the Belt Railroad, owned and operated by the State of California, even though California law gave them no legal right to strike, and the Federal Railway Labor Act was inconsistent with the civil service laws of California which regulated the employment relations of employees of the Belt Railroad, *California* v. *Taylor*, 353 U.S. 553, 566-567.

None of the cases cited in the decision of the New York Court of Appeals considered or decided the constitutionality of a statute which prohibited strikes against the Government, but made no provision for fixing just compensation for the involuntary labor which it commanded the workers to continue to perform for the Government, against their will.

The New York cases cited in the decision below considered only whether a statute can constitutionally termi-

nate the employment of persons who strike against the government, or impose some lesser employment discipline upon such persons (*Matter of DiMaggio* v. *Brown*, 19 N.Y. 2d 283; *Pruzan* v. *Board of Education*, 9 N.Y. 2d 911).

The Michigan case cited below (*Detroit* v. *Division 26 of Amalgamated Assn.*, 332 Mich. 237) decided only that employees who go on strike have no right to re-employment by the government. No question of punishment for criminal contempt for violating an anti-strike injunction was considered or decided in that case. Even so, Justices Black and Douglas dissented from this Court's dismissal of the appeal, and Justice Burton was of the opinion that probable jurisdiction should be noted. 344 U.S. 805.

The Cleveland case (41 Ohio App. 236), and the Norwalk Teachers' case (138 Conn. 269), considered only the need of the government for uninterrupted operations. Those cases did not consider or decide whether the government could constitutionally satisfy its own needs by prohibiting strikes by its employees, while doing nothing to satisfy the needs of its employees for just compensation for the labor that its statute commands them to continue to perform for the government against their will.

Auto Workers v. *Wisconsin Board*, 336 U.S. 245, sustained the constitutionality of a Wisconsin labor relations statute under which a Wisconsin Board ordered a union to cease interference with production, other than by a strike. The Court said that "nothing in the statute or the order makes it a crime to abandon work individually (compare *Pollock* v. *Williams*, 322 U.S. 4) or collectively."

In *United States* v. *United Mine Workers*, 330 U.S. 258, the dissenting opinion of Mr. Justice Rutledge said that "opposing claims concerning the right to strike and the power of the Government, as against this, to keep the nation's economy going * * * are indeed grave matters." 330 U.S. 385.

President John Adams said that the Constitution provides for a "government of laws and not of men." This

requires balancing the constitutional rights of individual citizens with the constitutional power of government to adopt measures it deems appropriate for its need for uninterrupted operations.

Such a balancing of individual rights with governmental needs requires the invalidation of the Taylor Law's anti-strike provisions, because it does not make any provision for fixation of just compensation for the involuntary labor which it commands public employees to continue to perform for the government, against their will.

(d) In any event, a statute cannot constitutionally prohibit a peaceful strike by governmental workers, unless it makes provision for payment of just compensation for the involuntary labor which it commands governmental workers to continue to perform for the government, against their will.

While legislatures have constitutional power "to mark the limits of tolerable industrial conflict in the public interest" (*Auto Workers* v. *Wisconsin Board, supra,* 336 U.S. 245, 249), they can not simply prohibit strikes by governmental workers, without making any provision for payment of just compensation for the involuntary labor which they command government workers to continue to perform for the government against their will.

In *Duplex Co.* v. *Deering, supra,* 254 U.S. 443, 488, the dissenting opinion of Mr. Justice Brandeis said that legislatures may limit labor disputes which endanger the community; and that such limitation may "substitute processes of justice for the more primitive method of trial by combat".

The Taylor law does not provide any process of justice for public employees, as a substitute for strikes by them, which it prohibits.

The due process clause of the 14th Amendment of the Federal Constitution requires the State of New York to give just consideration to the right of its governmental

workers to the fair economic value of their labor, instead of unilaterally fixing wages, and commanding the workers to continue to work at such wages, against their will.

When the government prohibits a strike and commands workers to continue to work, on the ground that their continued work is necessary in the public interest, then the workers have a constitutional right to judicial review of the unilateral fixation of their wages to determine whether the wages so fixed are so inadequate as to amount to deprivation of property without due process of law. *Wilson* v. *New,* 243 U.S. 332, 353.

Whenever the government unilaterally fixes wages or prices, and commands continued operation at the wages and prices so fixed, persons affected thereby have a constitutional right to judicial review of such wage and price fixations to determine whether they are so inadequate as to deprive them of the fair value of their labor, or of their property without due process of law. *Bowles* v. *Willingham,* 321 U.S. 503, 516-517; *Yakus* v. *United States,* 321 U.S. 414, 437; *Wilson* v. *New, supra,* 243 U.S. 332, 353.

The Taylor law does not provide any procedure for fixing just compensation for government workers whom it forbids to strike.

The absence of procedures for fixing just compensation for such continued involuntary labor of governmental workers unconstitutionally deprives them of liberty and property without due process of law.

The Taylor law does not provide collective bargaining as an alternative to strikes which it prohibits to governmental workers.

The Taylor law gives to "an employee organization" which represents a majority of public employees, a right "to represent the employees in negotiations and in the settlement of grievances" (Civil Service Law, § 208). But this right is incomplete and ineffective, because it imposes

no duty on the governmental employer to bargain collectively, in good faith, with the majority union of governmental employees, whereas comparable Federal and New York statutes do impose such a duty on private employers. 29 U.S.C. § 158(d); McKinney's New York Labor Law, § 704(b).

The mediation and fact finding procedures of the Taylor law are advisory, and not compulsory. McKinney's New York Civil Service Law, § 209. In this very case, Mayor Lindsay refused to accept the Mediators' recommendations, which the Sanitationmen accepted, on their Union's recommendation.

The report of Professor Taylor's committee stated that it was recommending "collective negotiations", instead of collective bargaining for governmental workers, because "It is the budget, rather than the market place, which constrains collective negotiation in public employment" (Taylor Report, pp. 12-13).

The Taylor Report stated that " 'collective negotiation' in the public services is unlike collective bargaining in the private enterprise sector. The strike cannot be a part of the negotiating process" (*id.*, p. 15).

This Court has said that "a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system." *Labor Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 234.

Like workers in private industry, governmental workers have a vital economic interest in the fixation of their wages, on which they depend for their livelihood.

The cost of living in New York City rose more than 5% in 1968, according to the Federal Bureau of Labor Statistics. This means that the purchasing power of money wages declined by the same percentage, thereby actually

reducing real wages, in terms of ability to buy things with the wages paid to governmental workers for their work. Governmental workers are victims rather than a cause of the rapidly increasing price inflation of recent years. They can not continue to work without frequent increases in their money wages, which do not even bring them up to the intervening increases in the cost of living.

By prohibiting them from striking, and by commanding them to continue to work for the government for wages that the government unilaterally fixes, the Taylor law gives them no alternative whereby they can "escape the obligation to go on" working for less than the fair value of their labor. *Pollock* v. *Williams,* 322 U.S. 4, 18.

4. The Taylor law denied to petitioners the equal protection of the laws by excluding them from the application of the State Labor Relations Laws and making no equivalent provision for payment of just compensation for the involuntary labor which it commands governmental workers to continue to perform for the government, against their will.

Governmental workers have the same constitutional right as other citizens to due process of law, under the Fourteenth Amendment, and to freedom of association, under the First Amendment of the Constitution of the United States. *Uniformed Sanitationmen's Association* v. *City of New York,* 392 U.S. 280. *Cf. Gardner* v. *Broderick,* 392 U.S. 273; *Garrity* v. *New Jersey,* 385 U.S. 493.

Assuming that the State of New York, as a sovereign government, has a need for uninterrupted governmental operations which can be met by a law that prohibits its employees from striking, we submit that, for the reasons previously stated, pp. 45-47, *supra,* such statutory prohibition can constitutionally be enforced only where the State provides by law an alternative procedure for fixation of fair wages for the involuntary labor that it commands its workers to continue to perform involuntarily for the government.

5. In any event, the injunction herein unconstitutionally went beyond the prohibition of a strike by Sanitation workers, by prohibiting informational picketing and meetings by such workers.

Even if the Taylor law constitutionally prohibited the Sanitationmen from striking, the injunction in this case went beyond the prohibition of a strike by Sanitationmen by prohibiting informational picketing in front of or in the vicinity of any City premises, "or calling meetings and causing crowds to collect in front of said structures" (R. 10).

Informational picketing, and holding meetings are activities that Sanitationmen and their Union had a constitutional right to use to voice and to publicize their demands for improvement in their wages and conditions of employment.

In *Re Berry,* 65 Cal. Rptr. 273, 436 P. 2d 273, the Supreme Court of California struck out prohibitions against informational picketing and meetings, from an injunction prohibiting a strike by social workers employed by the County of Sacramento.

Citing *Thornhill* v. *Alabama,* 310 U.S. 88, and *N.A.A.C.P.* v. *Button,* 371 U.S. 415, the California Supreme Court said that "the County has fallen far short of demonstrating a compelling public interest sufficient to justify limitation of *informational* picketing and demonstration per se in the locations where the order forbids such activities". (436 P. 2d at 284, emphasis by the Court.)

Conclusion

Substantial and highly significant questions of constitutional law are presented by this appeal; questions, which have never before been considered by this Court, upon the answer to which depend the constitutional rights of a multitude of public employees and the unions which they have formed to advance their rights as workers.

The convictions from which we are appealing substantially diminish the constitutional rights of civil servants, render them "non-persons" (Fortas, *Equal Rights—For Whom?*, 42 N.Y.U.L. Rev. 401, 404-5) and cast them into "a constitutional limbo in which they are relegated to a watered-down version of constitutional rights" (*Rankin* v. *Shanker*, 23 N.Y. 2d 111, 127, diss. op.; App. A).

It is to right this wrong that we are appealing and it is urged that this Court should hear and determine the grave questions here involved.

February, 1969

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